



STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

May 30, 2003

Eric E. Doster
Foster, Swift, Collins & Smith, P.C.
313 South Washington Square
Lansing, Michigan 48933-2193

Dear Mr. Doster:

This is a response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended.

FACTS

Your statement presents the following facts:

1. The Michigan Republican State Committee (MRSC) organizes and finances conventions, meetings, and conferences.
2. The MRSC organizes and finances three types of conventions: (a) odd-year conventions where party officers are selected; (b) fall conventions in even-numbered years where nominations for public offices are determined; and (c) spring conventions in presidential election years where national convention delegates are selected. With the exception of fall conventions held in even-numbered years, none of the offices at stake at the MRSC's conventions are public offices. Moreover, none of the resolutions adopted at the MRSC's conventions are ballot questions since none will appear on a ballot at an election for public office. Significantly, no political fund raising is conducted at MRSC odd-year state conventions and spring conventions held in presidential election years.
3. The MRSC's meetings are internal political party gatherings. While members of the public are certainly welcome to attend MRSC meetings, these are not candidate rallies, nor are candidates nominated at MRSC meetings. Although resolutions are occasionally adopted at MRS meetings, none of these resolutions are ballot questions since none will appear on a ballot at an election for public office. Significantly, no political fund raising is conducted at MRSC meetings.

4. On occasion, the MRSC organizes and finances conferences, such as the biennial Mackinac Conference and a Midwest Leadership Conference. Again, while members of the public are certainly welcome to attend these internal political party conferences, these are not candidate rallies, nor are candidates nominated at MRSC conferences. Resolutions are not adopted at MRSC conferences. These conferences are internal political party functions, the purpose of which is to educate participants on various topics, and are primarily issue-oriented in nature. Significantly, while an attendance fee is customarily charged to defray expenses of the conference, no political fund raising is conducted at the MRSC conferences.
5. In a Declaratory Ruling dated August 21, 1979, Secretary of State Richard H. Austin concluded that the Act was not applicable to odd-year state conventions because:
 - a. None of the offices at stake at this particular convention are public offices; and
 - b. none of the resolutions to be adopted are ballot questions since none will appear on a ballot at an election for public office.

Your request seeks the Department's confirmation that the MCFA does not apply to the MRSC's odd-year state conventions, spring conventions in presidential election years, meetings, and conferences, as described above.

ANALYSIS

As you note in your statement of facts, the Department has addressed this issue in its August 21, 1979 declaratory ruling to Mr. Richard McLellan. The facts that you presented are substantially similar to those presented by Mr. McLellan. Specifically, Mr. McLellan noted that his client, a corporation, wished to spend funds at a political party convention for the purpose of influencing the election of a party chair. No candidates for elective office were nominated at the convention. In that statement, the Department opined:

Section 6 of the Act (MCLA § 169.206) defines "expenditure" as meaning anything of ascertainable monetary value given to influence an election. "Election" is defined in Section 5(1) (MCLA § 169.205(1)) as "a primary, general, special, or millage election held in this state or a convention or caucus of a political party held in this state to nominate a candidate." "Candidate" is defined in Section 3(1) (MCLA § 169.203(1)) as an individual holding or seeking an elective office. "Elective office" is defined as a public office filled by an election.

None of the offices at stake at this particular convention are public offices; moreover, none of the resolutions to be adopted are ballot questions since none will appear on a ballot at an election for public office. Section 2(1) (MCLA § 169.202(1)) defines "ballot question" as a question which is submitted or which is intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot.

Accordingly, the expenditures in question are not prohibited by the Act and also need not be reported or recorded as expenditures under the Act.

The Department can see no reason to depart from the rationale enunciated in the McLellan ruling.

The MCFA does not govern the activities of persons—including political parties—whose activities cannot be defined as contributions or expenditures. It is the Department's opinion that the MCFA does not apply to the MRSC's odd-year state conventions, Presidential-year spring conventions, meetings, or conferences, as described in your statement of facts.

Because your request does not include a complete statement of facts sufficient to form the basis for a declaratory ruling, this response is informational only and constitutes an interpretive statement with respect to your inquiries.

Please contact the Bureau of Legal and Regulatory Services at (517) 241-3463 if you have any additional questions.

Sincerely,

/s/

Brian DeBano
Chief Operating Officer

BD/DEM/kc

cc: Bureau of Legal and Regulatory Services



STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

May 30, 2003

Robert S. LaBrant
Michigan Chamber of Commerce
600 South Walnut Street
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

This is a response to your two requests for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended. Your requests reference two complaints that you filed in the fall of 2000, both of which concerned the Department's interpretation of the term "independent expenditure." Section 9(2) of the MCFA defines "independent expenditure" as "an expenditure by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." You have asked that the Department share its rationale regarding independent expenditures with the public.

REQUEST 1 – RECEIVED MARCH 6, 2003

Your first request concerns a complaint filed in the fall of 2000 against the Michigan Democratic Party (MDP) and candidate Herb Kehrl. Mr. Kehrl had placed various pictures, testimonials, and biographical information on his candidate committee website. The MDP procured some of this material for use in an advertisement (a flier). The MDP considered the advertisement's production and distribution costs to be an independent expenditure on behalf of the Kehrl campaign. Your complaint alleged that the MDP should have categorized the advertising costs as an in-kind contribution to the Kehrl campaign.

The Department, during the course of its investigation, found no evidence to indicate that the Kehrl committee was involved with the production or dissemination of the ads. Further, Kehrl's response indicated that the web site material was available for public use—including use by his political opponents. The Department, finding no reason to believe that the Kehrl committee directed or controlled the MDP's expenditure, dismissed the complaint.

The Department will apply the same reasoning to future complaints. The Department will not consider a 3rd party's use of candidate web site material to be prima facie evidence of candidate committee direction or control. Further, absent evidence to the contrary, it will consider

communications created with material accessible to the general public or news media to be evidence of an independent expenditure, rather than an in-kind contribution.

REQUEST 2 – RECEIVED MARCH 11, 2003

Your second request concerns a complaint filed in the fall of 2002 against the MDP and candidate Virg Bernero. The MDP produced and distributed political advertisements (fliers) on behalf of Bernero. The fliers included constituent letters, photographs, and testimonials. The MDP had categorized the communications as independent expenditures, while you alleged that they should be categorized as in-kind contributions.

The Department's investigation established the following facts:

1. The Bernero committee received several "thank you" letters from school children. Copies of those letters were provided to the MDP, which used them in the political advertisement.
2. The Bernero committee arranged for the MDP to take photographs of, and get commentary from, two constituents. Both the photographs and the commentary appeared in the political advertisement.
3. The Bernero committee placed photographs and information on its website. The MDP downloaded both and used them in the political advertisement.

The facts of the Bernero complaint, unlike those of the Kehrl complaint, indicated various discussions and exchanges between the candidate and the MDP. The Department faced the question: Do the discussions and exchanges—in effect, coordination—between the candidate committee and a 3rd party constitute direction or control by the candidate?

The MCFA's undefined "direction or control" standard stands in marked contrast to the "coordination" standard of the Federal Election Campaign Act (FECA), 2 U.S.C. 431 *et seq.* FECA requires expenditures to be categorized as in-kind contributions if coordination, cooperation, or consultation occurs between the candidate committee and the 3rd party making the expenditure. According to the FECA's regulations (2 CFR 100.23(c)) coordination occurs when a communication is created, produced or distributed—

1. At the request or suggestion of the candidate or the candidate's authorized committee; or
2. After the candidate or the candidate's agent has exercised control or decision making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication; or
3. After substantial discussion or negotiation between the creator, producer, or distributor of the communication, or the person paying for the communication, and the candidate or candidate's committee regarding content, timing, etc. Substantial discussion or

negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance for a particular election.

While the FECA regulates nearly all coordination, cooperation, and consultation between a candidate committee and a 3rd party, the MCFA clearly does not. The FECA does not control the MCFA, but its language illustrates a very important point: Direction or control (essentially #2 above) is a form of coordination, but not all coordination—or cooperation, or consultation—constitutes direction or control by a candidate committee.

The Department, after applying the direction or control standard to the evidence of MDP-Bernero coordination, dismissed the complaint. The MCFA does not give the Department the authority to regulate those interactions and exchanges that do not constitute direction or control by the candidate committee. The Department concluded that providing constituent letters and contact information did not indicate that the Bernero committee was exercising direction or control over the expenditure.

In dismissing the complaint, the Department also noted that the Federal Election Commission has the ability to enforce their more stringent regulations. The FEC can subpoena documents and depose witnesses in order to create a factual record from which to establish coordination between committees. The Department of State cannot subpoena persons or records, and must rely on the evidence and pleadings of the parties.

INTERPRETATIONS

To provide guidance on the meaning of the “direction and control” standard, we offer the following interpretations:

“Made at the direction of another person”

An expenditure, or a communication resulting from an expenditure, that is organized, supervised, or created by a candidate committee. An example would be a candidate committee that creates a proposed communication and gives it to an independent committee. If that independent committee then produced a communication that was substantially similar to the proposed communication it would have been made at the direction of the candidate committee. However, if an independent committee requested photographs or information from the candidate committee and then produced a communication, we would not view the candidate committee as directing the communication.

“Under the Control of Another Person”

“Control” would seem to be a higher degree of power exercised by the candidate committee than “direction.” A candidate committee’s ability to terminate a potential expenditure, or a communication resulting from an expenditure, would constitute control. Examples of control would be a candidate’s conscious decision to appear at a specific place at a specific time for filming, with the knowledge or understanding that the footage would be used in a communication. Another example would be a candidate committee that arranged for a

Robert S. LaBrant
May 30, 2003
Page 4 of 4

2-03-CI

contribution to be made to an independent committee, with the understanding that the independent committee run independent ads on the candidate's behalf. Finally, a candidate committee that has the ability to review a communication and either accept, reject, or modify it would be exercising control.

Because your request does not include a complete statement of facts sufficient to form the basis for a declaratory ruling, this response is informational only and constitutes an interpretive statement with respect to your inquiries.

Please contact the Bureau of Legal and Regulatory Services (517) 241-3463 if you have any additional questions.

Sincerely,

/s/

Brian DeBano
Chief Operating Officer

BD/DEM/kc

cc: Bureau of Legal and Regulatory Services